

NO. 4094

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PAUL LUND,

Plaintiff-Appellant,

VS.

TOWN OF PETERSBURG,

Defendant-Appellee.

BRIEF FOR APPELLANT

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NUMBER
ONE, AT JUNEAU.

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STATEMENT.

This is an action brought by Appellant, who was the plaintiff in the lower Court, against the Town of Petersburg, a municipal corporation, the defendant below, to enjoin the said Town of Petersburg from issuing its bonds for the purpose of erecting an electric light plant.

On September 29, 1919, Congress passed an Act authorizing the Town of Petersburg, a municipal corporation, to issue bonds in the sum of \$75,000.00 for the purpose of erecting an electric light plant and a school house, of which \$50,000.00 was to be expended for the construction and installation of an electric light and power plant, and \$25,000.00 in the construction of a public school building. (Tr. p. 13).

On June 5, 1920, Congress amended this Act by another Act and authorized the issuance of bonds in a sum not exceeding \$150,000.00 for the purpose of constructing and installing a municipal electric light plant and a public school building, of which the sum of \$115,000.00 was to be used for the construction of an electric light plant and \$35,000.00 for the erection of a school house. (Tr. p. 15).

The Town of Petersburg, after an election as provided by the Acts of Congress above mentioned, and in the manner prescribed by law, passed Ordinance No. 64 (Tr. p. 25), providing for the issuance, sale, maturity and redemption of the bonds authorized for the erection of an electric light and power plant.

Ordinance No. 64 provides for the maturity and payment of said power bonds as follows: \$5,000.00 on July first of the years 1928, to 1942, inclusive, and \$40,000.00 on July first, 1943; and that interest shall be paid on the bonds semi annually at the rate of seven per cent per annum.

Appellant alleged that the Town of Petersburg had sold and was now about to issue and deliver \$35,000.00 general bonds of the Town for the purpose of the erection of a school building, as authorized by the Acts of Congress, hereinbefore mentioned, and that the Town was about to issue and sell the bonds in the sum of \$115,000.00 for the erection of an electric light plant in the manner provided in Ordinance No. 64; and that unless restrained, the Town of Petersburg intended to use the proceeds of the sale of said bonds to acquire real and personal property outside its corporate limits for the construction of a municipal electric light and power plant, transmission lines, etc., and that when the power plant was erected, the town would sell current and electric energy to private individuals and corporations to be consumed outside the corporate limits of the town, and it would thereby obligate the town and its common council to levy and collect annual general taxes upon real and personal property in the town in excess of two per cent. of the assessed valuation of said property, and would incur a municipal indebtedness in excess of the authority conferred upon it by law.

Appellant prayed for an injunction permanently enjoining the town from issuing all or any part of the bonds for the erection of a light and power plant.

Appellant alleged in his complaint that the total population of the Town of Petersburg was ap-

proximately one thousand and the total assessed valuation of all its taxable property was \$598,-780.00 and that the total annual revenue of the town from all sources, including taxes and licenses was \$33,323.53 and that the total disbursements for school and municipal purposes was \$29,903.56 annually. (Par. 20, Complaint, Tr. p. 10).

Appellant also alleged that in addition to the general expenses for school and municipal purposes heretofore required, the town had sold and was about to issue and deliver the \$35,000.00 general bonds of the town authorized by the Acts of Congress for the erection of a public school building, thereby incurring further obligations for the payment of these bonds and the semi annual interest due upon them.

A general demurrer was interposed by defendant-appellee to this complaint and the matter was submitted to the Court upon the demurrer, and the Court on August 29, 1923, made and entered an order sustaining the demurrer, and on the same date judgment was entered in accordance with the order sustaining the demurrer.

ASSIGNMENTS OF ERROR.

There are two assignments of error, which present the same questions; namely:

I.

Was it error to make an order sustaining the demurrer to plaintiff's complaint?

II.

Was it error to enter the judgment in favor of defendant-appellee upon such order?

POINTS, ARGUMENTS AND AUTHORITIES.

The questions presented by this appeal are the following:

I.

Has the Town of Petersburg authority to levy a tax upon real and personal property in excess of two per cent annually upon the assessed valuation of said property within the corporate limits in order to provide for the payment of the bonds and the interest on the same?

II.

Has the Town of Petersburg authority to sell electric current and power to be used and consumed outside the corporate limits of the town?

III.

Has the Town of Petersburg authority to bind itself to pay the bonds before the expiration of the period prescribed in the Acts of Congress authorizing their issuance?

I.

HAS THE TOWN OF PETERSBURG
AUTHORITY TO LEVY A TAX UPON REAL
AND PERSONAL PROPERTY IN EXCESS OF
TWO PER CENT. ANNUALLY UPON THE

ASSESSED VALUATION OF SAID PROPERTY
WITHIN THE CORPORATE LIMITS IN ORDER
TO PROVIDE FOR THE PAYMENT OF THE
BONDS AND THE INTEREST ON THE SAME?

The Acts of Congress authorizing the bond issue do not make any provision for the levy of an additional tax for the retirement of the bonds; and the Act does not authorize bonds to be issued in any specific sum, but authorizes the Town to issue bonds for the erection of an electric light and power plant and a public school building in a sum not exceeding \$150,000.00, of which sum not to exceed \$115,000.00 is to be used for the construction of an electric light and power plant and system.

All the allegations of the complaint are admitted by the general demurrer; and the complaint alleges that unless additional taxes are imposed, the bonds cannot be retired nor the interest paid. The assessed valuation of all real and personal property within the corporate limits is less than \$600,000.00, and the ninth subdivision of Section 627 of the Compiled Laws of Alaska, from which the Town derives its powers, gives the town authority "to assess, levy and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property. * * *"

Section 628 of the Compiled Laws of Alaska provides "that the council shall have no authority to issue bonds or incur any bonded indebtedness,

nor shall they have authority to incur a greater indebtedness or liability of any kind in any year than the current revenues of the municipality for that year."

By the Acts of September 29, 1919, and June 5, 1920, Congress has amended this Section insofar as it is applicable to the Town of Petersburg by giving it authority "to issue bonds and incur a bonded indebtedness," but it has given the town no authority to incur a greater indebtedness or liability in any year than the current revenues of the town for that year. The authorization by Congress of this bond issue does not conflict with the provisions of Section 628, prohibiting the town from incurring any greater indebtedness or liabilities in any year than the current revenues of the town for that year. The bonds are authorized as before stated, not in any specific amount, but in a sum *not exceeding* \$115,000.00, and Congress must have assumed that the town would not issue bonds in a greater sum than its current revenues, derived under the provisions of Section 627, Compiled Laws of Alaska, were sufficient to pay.

"A statute authorizing a municipality to issue bonds 'in any amount' in aid of a railroad will be construed to mean any amount within the constitutional or statutory limit, and therefore not in conflict with it."

28 Cyc, 1583.

Atl. Trust Co. v. Darlington, 63 Fed. 76.

McQuillan on Municipal Corporations, Sec.

2284.

“In the construction of a grant of any power to tax made by a state to one of its municipalities, the rule accepted by all the authorities is that it should be with strictness. If the authority of the municipality to tax is doubtful, the doubt must be always resolved against the tax. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all that it has intended to grant, and whatever authority the municipal officers assume to exercise, they must be able to show a warrant for it in the words of the grant. * * The mischief of a strict construction is easily obviated by the legislature, but the mischief of a liberal construction may be irremedial before it can be reached.”

McQuillan on Municipal Corporations, Sec. 2371.

The general rule in such cases is that in case of doubt the power must be denied.

McQuillan on Municipal Corporations, Sec. 352.

II.

HAS THE TOWN OF PETERSBURG
AUTHORITY TO SELL ELECTRIC CURRENT
AND POWER TO BE USED AND CONSUMED
OUTSIDE THE CORPORATE LIMITS OF THE
TOWN?

There are authorities holding that a city which owns a municipal water works system or electric light and power system may contract to sell its

surplus power outside the corporate limits, but the city has no implied power to furnish water or light beyond its territorial limits.

McQuillan on Municipal Corporations, Sec. 1800.

The power to provide for electric lights and power by the municipality is found in the 6th subdivision of Section 627 of the Compiled Laws of Alaska. This statute gives the city the "power to provide for fire protection, water supply, *lights*, wharfage, public health, police protection, and the relief of the destitute and indigent."

This section has been amended by Chapter 97 of the Session Laws of Alaska, 1923, approved May 4, 1923, as follows:

"4th. To purchase, construct or otherwise establish and maintain plants for the distribution and use *in the City* of light, heat and power by electricity, gas or otherwise; to similarly establish and maintain for use *within the city* telephone systems, water works, electric light and power plants for the purpose of serving the city and the public. Provided, however, such public utilities as provided in this subdivision shall not be operated or maintained by funds raised by taxation but from revenues collected for services rendered by such plants or utilities by customers or users thereof."

4th Subdiv. Sec. 12, Chapt. 97, Session Laws of Alaska, 1923.

It will thus be seen that neither of these laws gives the city the authority to provide for electric current and power to persons or corporations out-

side the corporate limits; and the Acts of Congress of September 29, 1919, and June 5, 1920, are silent upon this subject.

“It is a general principal that a municipal corporation cannot usually exercise its powers beyond its own limits and if it has authority to do so, it must be derived from some statute which expressly or impliedly permits it.”

Coldwater v. Tucker, 24 Am. Rep. 601.

“Ballenger’s Annotated Codes and Statutes, Sec. 739, and the charter of a city of the first class give it power to acquire water works and to supply the city and its inhabitants with water. Laws of 1897, page 326, Chapter 112, Sec. 1, in defining the powers of city to construct and operate water works, confines the purpose to the furnishing of such city or inhabitants thereof ‘and any other persons’ with a supply of water. Held that the phrase ‘any other person’ only applies to persons within the corporate limits; and a city of the first class has no authority to supply water to another municipality.”

Farwell v. City of Seattle, 86 Pac. 217.

There are authorities holding that where a city owns a municipal lighting plant or water system, the principles of good business require that *surplus* water or power may be sold to consumers outside the city limits. But in this case, in sub-division “c” of paragraph 21 of the complaint (Tr. p. 11), it is alleged that the city will sell to private individuals, firms and corporations *electric energy* generated by said power plant to be used and consumed

outside the corporate limits of said town. It is not alleged that the city will sell only its surplus power but the allegation is that the city will sell *electric energy*, etc., to be used and consumed outside the corporate limits.

The city does not deny that it will do this, and does not meet this allegation by stating that it will sell only its surplus power; but the allegations of the complaint are admitted for the purpose of the demurrer, and if the District Court was correct in sustaining the demurrer, there would be nothing to prevent the city of Petersburg, after the electric light plant is established, from selling current to consumers outside the city at the expense of the residents and tax payers within the corporate limits. The city might have at times insufficient power to meet the demands of outside consumers and also the demands of its own inhabitants; and a tax payer might own an establishment in the city upon which he is paying taxes for the retirement of the bonds, and he might require power or electric current which the city could not supply him, on account of the demands made upon it by outside consumers under contracts or agreements with the city. Such a state of affairs might easily arise and a man whose property is not subject to taxation by the city for the reason it is outside the corporate limits may get the preference in the matter of service over the man whose property is in the city and subject to a heavy tax for the payment of the bonds and interest.

III.

HAS THE TOWN OF PETERSBURG
AUTHORITY TO BIND ITSELF TO PAY THE
BONDS BEFORE THE EXPIRATION OF THE
PERIOD PRESCRIBED IN THE ACTS OF CON-
GRESS AUTHORIZING THEIR ISSUANCE?

Section 7 of Ordinance No. 64 provides for the creation of a sinking fund for the payment of the bonds as they mature, and the interest thereon. This section provides for the levy of a tax upon all real and personal property situated within the corporate limits of the town subject to taxation in an amount sufficient to pay the interest and the installments of principal, etc. (Tr. p. 33).

Section 2 of Ordinance No. 64 (Tr. p. 27) provides that the bonds shall mature at the rate of \$5,000.00 each year from 1928 to 1942, and \$40,000.00 on July 1, 1943.

There is no provision in the Act of Congress of September 29, 1919, or the Act of June 5, 1920, for the creation of a sinking fund and the Ordinance provides that this sinking fund be created by the levy of a tax on real and personal property; and it is submitted that the appellee concedes that the revenues of the city would not be sufficient to retire these bonds, pay the interest, and provide a sinking fund without the levy of a tax in excess of the limit already provided in the 9th subdivision of Section 627, Compiled Laws of Alaska.

If the council of the town of Petersburg could provide such a sinking fund as prescribed in Ordinance No. 64, why might it not provide a greater sinking fund and increase the taxes on real and personal property in proportion to the size of the sinking fund required. If the city council may levy an additional tax of two per cent upon all real and personal property for the purpose of creating a sinking fund, why might it not levy a tax of four per cent. or eight per cent. for such purpose. In view of the authorities cited above that the powers of a municipality to tax should be construed with strictness, we submit that the city has no authority to levy this additional tax for the creation of a sinking fund.

Respectfully submitted,

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Attorney for Appellant.

